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2. See County courts.
3. The county court has no right to grant letters of administration to a stranger, before an opportunity is afforded, within the time prescribed by the statute, to those entitled to administer, to take out letters: and where the court had thus, improvidently, granted such letters to a stranger, the letters were properly revoked on the application of those entitled to administer.—*Mullanphy v. St. Louis co. court*, 563.
4. An appeal lies from the decision of the county court revoking letters of administration; such appeal, however, does not operate as a supersedeas. The provision of the statute, concerning the supersedeas, only applies to those cases in which the appellant is adjudged to pay a debt. - - - - - - - - - - *ib.*

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APPEAL.

1. See Justices courts, 3.
2. No appeal lies from the decision of a jury summoned by a constable to determine the right of property between the claimant and defendant in the execution.—*Little v. Seymor & Bool* - - - - - - - - - - - - - - 166.
3. The only effect of the decision of the jury, in such case, is the justification of the constable in selling the property. - - - - - - - - - - *ib.*
4. See County courts.
5. An appeal lies from the decision of the county court revoking letters of administration.—*Mullanphy v. St. Louis co. court.* - - - - - - - - - 563.
6. An appeal will not lie from the judgment of the circuit court on an incidental matter, the *suit* being yet undetermined.—*George*, (*a man of color*) *v. Craig.* 548.

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ASSIGNMENT.

A plea alleging an assignment of the instrument sued on, by the plaintiff to a third person, should state the form of the assignment, for if the instrument was verbally assigned the assignee could not sue upon it in his own name.—*Thomas v. Cox.* 506.

ASSUMPSIT.

1. A died possessed of certain lands, which, by order of the circuit court, were directed to be sold, and the proceeds distributed among the representatives of deceased. By agreement among the representatives, defendant, who had married one of the daughters of deceased, became the purchaser of the land, and was to sell the same for the benefit of all the representatives; defendant in pursuance of this agreement sold the land to one J. Held, that under this state of facts, an action of assumpsit for money had and received, could be maintained against defendant in favor of plaintiff's, representatives in part of deceased, for their distributive share of the proceeds.—*Musick & wife v. Richardson.* . . . . . 171.
2. Where a bill of exchange, drawn by plaintiff on defendant, the consideration of which was goods sold and delivered &c., was protested for non payment, the amount due may be recovered in an action of assumpsit for goods sold, &c.—*Sweeny v. Willing.* . . . . . 174.
3. A declaration in assumpsit must aver a promise on the part of defendant, and unless the liability of defendant is shown, by proper averments, the defect is not cured by verdict.—*Muldrow v. Tappan et al.* 276
4. See Bills of Exchange, 2.

ATTACHMENT.

1. A constable has no power to summon a jury to try the right of property attached. The act concerning attachments, (R. C. 1835, p. 85,) requires him to keep the property attached in his custody, unless the person in whose hands the same is found, or the owner thereof, will give bond, &c., that the property shall be forthcoming when &c., to abide the judgment in the cause.—*Little v. Seymour & Bool.* 166
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Upon a suitable suggestion of facts, the attorney will be required to show some authority, either verbal or written, for conducting the suit.—*Keith v. Wilson.* 435

AVERMENTS.

1. The courts will not take cognizance judicially, that "New Orleans" is in the State of Louisiana. There must be an averment to that effect in the declaration.—*Riggin v. Collier & Pettus.* 568
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1. Murder, except in the first degree, is a bailable offence.—*Shore & others v. The State.* 640

BILLS OF EXCHANGE.

1. See Assumpsit, 2.
2. Assumpsit on a bill of exchange drawn by plaintiff on one S, in favor of defendant, and by defendant endorsed to plaintiff: Held, that as no special circumstances were alleged in the declaration rebutting the presumption arising from the position of

the parties on the bill, the plaintiff could not recover. Quere, whether an action could have been maintained, if the facts as they really existed, has been alleged in the declaration? viz: That plaintiff signed the bill as drawer without consideration and merely to accommodate defendant, who signed as endorser, and endorsed the bill to plaintiff for the purpose of securing the payment of a debt due the plaintiff by S, the drawee.—*Thoms v. Greene.* - - - - - - - - - 482

3. Our statute in relation to damages on bills of exchange is not limited to the holders of the bills at the time they become due.—*Riggin v. Collier & Pettus.* 568

BILL OF EXCEPTIONS.

1. See Practice—6 & 19.

BOATS AND VESSELS.

1. The affidavit required to be made to the complaint of the plaintiff, in a suit instituted under the act concerning "boats and vessels," (R. C. 1835, p. 103,) if not made by the plaintiff himself, should show what means the affiant had of knowing the truth of the particulars specified in the complaint.—*Bridgeford et al v. S. B. Elk,* - - - - - - - - - - - - - - - 356

2. Not guilty, is not a good plea to a complaint, founded upon contract, filed against a steam boat, under the act concerning "boats and vessels." The plea must correspond with the nature of the complaint.—*Erskine & Gore v. S. B. Thames,* 371

3. Where the complaint is founded upon the non-performance of a contract of affreightment, for the delivery of goods, the plaintiff need not aver, in his complaint, a demand for the delivery of the goods, - - - - - - - - - - *ib.*

4. The carrier is bound to give notice of the arrival of the goods to the persons to whom they are directed, if they are known to him, and within a reasonable time. Having done this, he would have performed his duty on his contract, by delivering the goods to such person on the bank of the river, at the usual place of delivery. *ib.*

5. A complaint filed against a steam boat, under the act concerning "boats and vessels," for mal-performance of a contract of affreightment for the delivery of goods, should set forth the proper parties; state, with whom the contract was made; the terms of the contract; when it was entered into; the quantity of goods delivered; and should also show, that the suit was commenced within six months after the cause of action commenced; otherwise, the complaint does not "set forth the plaintiff's demand *in all its particulars,*" as required by the 4th section of the above act. *Perpetual Insurance Co. v S. B. Detroit.* - - - - - - - - - 374

6. In a complaint filed against a steam boat for mal-performance of the contract of affreightment, for the transportation and delivery of property, the description of the property need not be more particular, than the description of the same contained in the bill of lading.—*Camden & Co. v. S. B. Georgia.* - - - - 381

7. It is no objection to the complaint, that the subject matter thereof is stated in different ways, so as to suit the evidence the plaintiff may be able to produce. *ib.*

8. The complaint may be amended like a common law declaration; and, it is the duty of the court to grant permission to amend, as in ordinary cases at common law. *ib.*

9. In proceedings against a steam boat, under the act concerning "boats and vessels," (R. C. 1835, p. 102,) the fact that the boat was seized, under the provisions of said act, within the jurisdiction of this State, is prima facia evidence that such boat was "used in navigating the waters of this State."—*Russell v. S. B. Elk.* 553

10. It is sufficient that it appear on the face of the complaint, that the action against such boat was commenced within six months after cause of action accrued, without a positive averment of that fact. - - - - - - - - - - *ib.*

11. A note given on behalf of the owners of a steam boat, by their authorised agent, the clerk of the boat, for the amount of complainants demand, is evidence—in proceedings instituted against such boat, to enforce the payment of such demand—of the justice as well as the amount of the claim.—*Byrne v. S. B. Elk.* - 555

12. Merchandise furnished the master of a steam boat, for the purpose of enabling him, therewith, to purchase wood and other necessaries for the boat in the prosecution of her trip, becomes a "debt contracted by the master, on account of supplies furnished for the use of such boat," within the meaning of the 1st sec. of the act concerning "boats and vessels."—*S. B. G. Brady v. Buckley & Randolph.* 558

BONDS AND NOTES.

1. A bond signed by a partner in the name of the firm, may be described as the bond of any one of the partners; our statute permitting the obligee to sue as many of the obligors as he thinks proper.—*Griffin & Kinote v. Samuel.* - - - 50
2. To make a note "*negotiable*," within the meaning of the 6th section of the act concerning bonds and notes, (R. C. 1835, p. 104,) it must contain the words "for value received, *negotiable and payable* without defalcation." It is not sufficient that it contain the words "for value received, without defalcation."—*Austin & Haines v. Blue.* - - - - - - - - - - - - - - - 265
3. The ninth section of the act concerning bonds and notes, (R. C. 1835, p. 105,) was intended to embrace all negotiable paper, except such as is specified in the sixth, seventh and eighth sections of that act.—*Pococke v. Blount.* - - - - 338
4. In a suit by the endorsee of a promissory note, (not being a negotiable note within the meaning of the 6th section of the act concerning bonds and notes, R. C. 1835, p. 105,) against the endorser, it is not necessary to prove a demand upon the maker, and notice to the endorser. - - - - - - - - - - *ib.*
5. It does not seem necessary, in such a suit, that the insolvency of the maker should be proved by his taking the insolvent debtor's oath. That it was not in the power of the plaintiff, at any time, to have made the money due in the note from the maker by suit, seems sufficient proof of insolvency; which is a mixed question of law and fact, and must be left to the determination of the jury, subject to the instructions of the court. - - - - - - - - - - - - - - - *ib.*
6. The 2nd section of the act concerning "bonds and notes" (R. C. 1835, p. 105,) making bonds and promissory notes, for money or property assignable, does not apply to covenants which are left as at common law—not assignable so as to enable the assignee to sue thereon in his own name.—*Thomas v. Cox.* - - - - 506

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BUILDINGS.

1. See Lien, 1, 2 and 3.
2. On a judgment obtained under the provisions of the act of 19 Dec., 1821, (R. C. 1825, p. 195,) concerning "buildings," the execution can only issue against such property charged with the lien, as the defendant owned or possessed at the time of the commencement of the suit.—*Milam & others v. adm'r. of Bruffee.* - 635

CHANCERY.

1. A court of equity will not set aside a conveyance on the ground of mistake, unless it is clear from the evidence that the party conveying acted under a mistake or misconception in relation to the property conveyed.—*Tombs v. Tucker.* 16
2. The declaration of the defendant, that there was a mistake in the conveyance would be strong evidence against him, in the absence of evidence showing clearly that no mistake was made. - - - - - - - - - - - *ib.*

CONVEYANCES.

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A sold his "equitable title" to a tract of land to B, who executed his note to A, for the purchase money. It turned out that *A* had no title available at law or in equity: Held, that there was a total failure of consideration.—*Jones v. Shaver* 642,

CONSTUCTION.

1. No Statute shall be construed in such manner as to be inconvenient or against reason.—*Fanny v. The State.* 122.

CONSTABLES.

1. Where the justices of the peace has jurisdiction over the person and subject matter, the warrant, though defective, is sufficient to justify the constable.—*Hickman v. Griffin.* 37.
2. See attachments. 1.
3. " appeal, 2 and 3.
4. If a constable suffers property attached to pass out of his hands in an illegal proceeding he is liable on his official bond.—*Little v. Seymour and Bool.* - 166

CONSTITUTION.

1. See Jurors, 2.
2. "crimes and punishments. 7.
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CONTINUANCE,

It is error in the circuit court to refuse to grant a continuance when a good cause is shewn.—*Porter v. CcCullough.* - - - - - - - - - - 444.

CONTRACTS.

1. M. contracted with F. for two hundred pork barrels, of the ordinary size and quality. M. afterwards received of F. that number of barrels, but not of the size and quality contracted for, nor in discharge of the contract. Held, that M. was liable for the barrels received, according to their common selling price.—*Murray v. Farthing.* 251.
2. See Fraud. 2.

CORPORATIONS.

1. The act to incorporate the stockholders of the Bank of Missouri, (R. C. 1825, p. 164,) passed Jan. 30, 1817, continued in force until Feb. 1, 1838; and, during that time, the Bank had a legal existence for all the purposes contemplated by the act of incorporation.—*Lindell v. Benton et al.* - - - - - - - - - 361
2. In a writ of attachment, issued against a corporation, under the 8th section of the "act to regulate proceedings against corporations," (R. C. 1835, p. 126,) it is not necessary to mention the names of the garnishees: neither is it necessary, that the sheriff should state in his return, that he had been directed, by the plaintiff or his attorney, to summon such garnishees. - - - - - - - - *ib.*
3. Legal proceedings regularly commenced against a corporation, are not affected by the expiration of the charter before the determination of such proceedings. *ib.*
4. See Jurors, 2.
5. " Pleading, 14.

COSTS.

1. See Slaves, 1.
2. In actions of trespass if any damages be found for the plaintiff, he shall recover his costs, (see R. C. 1835, title costs, p. 129, s. 13,) (see R. C. 1835, title justices courts, p. 348, s. 4.)—*Grant ex'r of Stone v. Brinegar.* - - - - - 450

COUNTY COURTS.

1. Where a demand is presented to the county court for allowance against a decedent's estate, and disallowed, the decision of the court is a judgment, and is attended with all the legal consequences of a judgment of a court of record at common law: consequently, if the claimant neglects to prosecute his appeal in the manner pointed out by the statute, the matter becomes res-adjudicata, and he is forever barred.—*McKinney's adm'r v. Davis.* - - - - - - - - 501
2. See Administration, 3 & 4.

COURTS.

See Jurisdiction 2.

COVENANT.

1. An action of covenant cannot be sustained on a covenant modified by a subsequent parol agreement.—*Raymond v. Fisher & Hanson.* - - - - - - 29
2. See Pleading, 5.
3. Where the covenantee forcibly prevents the covenantor from fulfilling his covenant, the covenantor is released from its performance.—*Jarret et al v. Adm'r of Cockey.* 159
4. There is an obvious distinction between covenants for the non-payment of money, or transfer of land, or other property, and those in which the party stipulates for work and labor The former class are not released by the death of the obligor, even though his death was occasioned by the act of the obligee; the physical capacity or incapacity of the obligor having no connection with the performance required. Otherwise where the personal services of a party are stipulated for. - *ib.*
5. A release from one obligee is a release from all the obligees. - - - - *ib.*
6. See Limitations, 3.
7. See St. Louis Commons.
8. Covenants are not assignable, so as to enable the assignee to sue thereon in his own name.—*Thomas v. Cox.* - - - - - - - - - 506
9. Nothing will discharge a covenant but a performance, or discharge under seal. *ib.*
10. A covenant to make and deliver a deed, on the demand of the covenantee, is broken by the first refusal to comply with the terms of the covenant in this respect, and a right of action immediately accrues against such covenantor, and to this right there can be no bar but accord and satisfaction, or a release.—*Kyle v. Hoyle* 526
11. K. covenanted with H. to convey to him certain property for a certain consideration, and, in part payment of the consideration, received from H. two acceptances of D's for $10,870,00, without the endorsement of H. On account of the doubtful circumstances of D. these acceptances were taken as $5,000 00. H. delivered the acceptances to K. who converted them to his own use, and refused to perform his covenant. In an action of covenant, the court held the measure of damages to be the full amount expressed on the face of the acceptances, and interest on the same at the rate of ten per centum from the time they became due. - - *il.*

CRIMES AND PUNISHMENTS.

1. See Slaves. 1.
2. Indictment under the 9th sect. of 8th art. of the act concerning crimes and their punishments (R. C. 1835,) for defiling a white female under the age of eighteen years, confided to the care and protection of deft. Held that the statute includes not only guardians but all other persons to whose care or protection any such fe-

male shall have been confided, and that the word "of" following the word "or" and preceding the words "any other person," must be rejected in order to render the section intelligible.—*The State v. Acuff.* - - - - - - - - - 54.
3. The 2nd and 3rd sections of the act of February 6th 1836 concerning crimes and punishments, providing that any slave thereafter convicted of a *felony*, &c., shall be punished by whipping, &c., were intended only to substitute a punishment in lieu of that prescribed in the repealed sections; leaving slaves still punishable with *death* for murder in the first degree.—*Fanny v. The State.* - - - - 122
4. Were there room for doubt on this subject, the 27th section of the 3rd article of the state constitution, providing that a slave convicted of a capital offence shall suffer the same degree of punishment, and no other, than would be inflicted on a free white person for the same offence, settles that doubt. - - - - *ib.*
5. A freeman, accessary to a felony committed by a slave, is punishable in the same manner as though the principal was a freeman.—*Loughridge v. The State,* 594
6. See Jurisdiction 3.
7. Murder, except in the first degree, is a bailable offence. Quere, whether the finding of an indictment for murder in the first degree, renders the *presumption so great* as to deprive the circuit court of power to admit to bail?—*Shore & others v. The State.* - - - - - - - - - - - - 640

CRIMINAL PRACTICE.

1. A person indicted for a capital offence may waive his right to a copy of the indictment, and if he pleads and goes to trial without making objection for the want of such copy, he cannot object after verdict.—*Lisle v. The State* - - 426
2. It devolves upon the defendant, indicted for keeping a ferry without license, to produce his license, and the state is not bound to prove that defendant had no license.—*Wheat v. The State.* - - - - - - - - - - - 455
3. Where a demurrer to an indictment is over ruled, and the defendant refuses or neglects to plead further, the court should direct the plea of not guilty to be entered.—*Thomas v. The State.* - - - - - - - - - - - 457
4. It is not necessary for the circuit attorney to subscribe his name to the indictment. - - - - - - - - - - - - - - *ib.*
5. Where in a change of venue in a criminal case, the record sent up is imperfect, the court will not, for that reason, discharge the defendant from his recognizance, especially as the change of venue in such cases is upon the application of the defendant.—*Laporte v. The State.* - - - - - - - - - - 208
6. The usual and regular mode of proceeding in such cases, is for the circuit attorney to suggest a diminution of the record, and move for a writ of certiorari, directed to the circuit court of the county from which the change of venue was taken, to send up the record. - - - - - - - - - - - - - - *ib.*
7. A writ of error will not lie on the decision of the circuit court in over ruling a motion to discharge a defendant from his recognizance, such not being a final decision in the cause. - - - - - - - - - - - - - - - *ib.*
8. The caption forms no part of the indictment.—*Kirk v. The State.* - 469
9. A change of venue cannot be granted on the application of the *owner* of a slave indicted for murder. The slave should petition in person for such change.—*Fanny v. The State.* - - - - - - - - - - - - - - - 122
10. A recognizance to appear on the *first* day of the term is forfeited by the failure of the cognizor to appear on that day. His appearance on a subsequent day of the term will not save his recognizance.—*Shore & others v. The State.* - - - 640
11. In criminal prosecutions, where a conviction would subject the defendant to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is, under the State constitution, a bar to any subsequent trial for the same offence.—*The State v. Spear.* - - - - - 644
12. In a prosecution instituted under the act concerning "Groceries and dram shops" for suffering spirituous liquor to be drank in the grocery of deft. evidence that deft. sold the liquor, and that the same was drank in his grocery, is presumptive evidence that the liquor was drank in the grocery with the permission of defendant.—*Casey v. The State.* - - - - - - - - - - - 646
13. The name of the prosecutor must be endorsed on an indictment for a riot, before the bill is returned by the grand jury.—*The State v. McCourtney & others.* 650

14. An accomplice may be a witness for others joined in the same indictment with himself, provided, he be not put upon his trial along with the others: so if he has pleaded guilty, or been separately convicted; provided, judgment has not been pronounced upon him for an offence which disqualifies him as a witness.—*Garrett v. The State.* - - - - - - - - - - 1
15. A witness cannot be permitted to state positively, that a party is not guilty of the offence charged against him. The witness must state facts which are known to him, and from these facts, the jury, under the direction of the court, are to find whether the accused is, or is not guilty. - - - - - - - *ib.*

DAMAGES.

1. See Covenant, 11.
2. " Bills of Exchange, 3.
3. " Trespass, 7.

DECLARATIONS.

See Evidence, 4th subdivision.

DEEDS.

1. A deed only takes effect from its delivery. but the possession of the deed by the grantee, is presumptive evidence of a delivery.—*Green & Yarnell v. Adm'r of Yarnell,* - - - - - - - - - - - - - - - - 326
2. In a doubtful state of facts, the acquiescence of an adverse claimant is entitled to great weight; but, otherwise where the facts are well established, and the parties seem to have been in a state of ignorance as to the law, - - - - - *ib.*
3. See covenant 10.

DEED OF ASSIGNMENT.

1. The courts of this State, in determining the validity of an assignment made in another State, will be governed by the laws of Missouri.—*Brown v. Knox & Boggs,* 302
2. An assignment by a debtor of all his property to trustees, for the benefit of such creditors as should, within a given time, execute a release, is void, - - *ib.*
3 Where the schedule, annexed to a deed of assignment, contains only a list of the preferred creditors, without specifying the amount of their several claims, such omission will not invalidate the deed, if it be unexceptionable in other respects, *ib.*
4. A deed of assignment for the benefit of such creditors as should, within a given time become parties thereto and execute a release, would be of no avail until executed by the creditors, even though such deed were not void on account of the stipulation for a release.—*Drake v. Rogers, et al.* - - - - - - 317

EJECTMENT.

1. The 2nd sect. of the act concerning ejectments (R. C. 1835, p. 234,) providing that ejectment may be maintained &c. against any person not having a *better title thereto,* under and by virtue of an entry with the register and receiver &c., was intended simply to place these entries &c. upon the footing of other legal titles, not meaning otherwise to alter any of the established rules and principles governing the action.—*Hunter v. Hemphill,* - - - - - - - - - - 106
2. In a declaration in ejectment, the description of the premises contended for, must be such as to enable the jury to identify them, with the description contained in the deeds upon which the plaintiff founds his claim; and other evidence is inadmissible to identify the premises described in the declaration, with those described in the deed.—*Newman v. Lawless,* - - - - - - - - - - 280
3. The rule of the common law, that the defendant, in an action of ejectment, may show an outstanding title in a third person to defeat the suit of the plaintiff, is not

changed by our statute, regulating the action of ejectment.—*Gurno v. Adm'r of Janis*, ... 330

ERROR.

1. It is error in the circuit court to refuse to grant a continuance when a good cause is shown.—*Moore & Porter v. McCulloch*, ... 444
2. A writ of error will not lie on the decision of the circuit court in overruling a motion to discharge a defendant from his recognizance, such not being a final decision in the cause.—*Laporte v. The State*, ... 208
3. See Practice, 4, 9, 21, 22.

ESCAPE.

See Sheriff 1.

EVIDENCE.

1. Matter of Record.
2. Legal Proceedings not of Record.
3. Witnesses—competency &c.
4. Declarations.
5. Evidence in particular cases, and under particular issues.

1. Matter of Record.

1. The Supreme Court will take notice of such facts only as appear on the record. *Nicholas v. The State*, ... 6
2. See Variance, 1 & 2.

2. Legal Proceedings not of Record.

1. Original papers in a proceeding before a justice of the peace, not being duly certified, cannot be read in evidence in the circuit court, without some proof of their authenticity.—*Hickman v. Griffin*, ... 37
2. The certificate of the Recorder of land titles, made in conformity with the act of Congress of May 26, 1824, is evidence of the facts contained in such certificate.—*Gurno v. Adm'r of Janis*, ... 330
3. The confirmations of the Recorder of land titles, under the act of Congress of 13th June, 1812, are evidence of title, in an action of ejectment, under our statute relating to evidence, (R. C. 1835, title evidence.' See adm'r of Janis v. Gurno, 4 Mo. R. p. 458. S. C. 6 Mo. R. 330.)—*Cerre v. Hook*, ... 474

3. Witnesses—competency, &c.

1. When a witness is asked on his cross examination, whether, on a former occasion, he has not made certain statements, and answers, that he does not recollect having made such statements, his credit may be impeached by evidence that he did in fact make the statements.—*Garrett v. The State*, ... 1
2. An accomplice may be a witness for others joined in the same indictment with himself, provided, he be not put upon his trial along with the others: so, if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him as a witness, . . *ib.*
3. A witness cannot be permitted to state positively, that a party is not guilty of the offence charged against him. The witness must state facts which are known to him, and from these facts, the jury, under the direction of the court, are to find whether the accused is, or is not guilty, ... *ib.*
4. If a witness is sworn and gives some evidence, however formal or unimportant, he

may be cross examined in relation to all matters involved in the issue.—*Page v. Kankey*, ... 433
5. A witness cannot, by contumacious behavior, deprive a party of the benefit of his testimony, if there be no laches or connivance on the part of the person who has a right to his testimony.—*Keith v. Wilson*, ... 435

4 Declarations.

1. Evidence of what a witness declared on a former occasion respecting the guilt of a prisoner on trial, is not admissible to prove the guilt of the prisoner.—*Fanny v. The State.* 122
2. Although it is well settled that the declarations of an assignor of a note, made after the assignment, cannot be admitted to affect the interest of the assignee, yet the assignor himself may be examined.—*Porter & Moore v. Rea.* 48

5. Evidence in particular cases, and under particular issues.

1. Evidence which has a tendency to disprove the facts which the other party is endeavoring to establish is admissible, particularly if such evidence can be drawn from the witness of the other party.—*Davis v. Cooper.* 148
2. In cases where the proceeding is either summary or *ex parte*, and especially where the same is in derogation of common right, strict proof is necessary that the requisites of the law have been complied with.—*Morton v. Reed.* 64
3. Whenever the law requires an officer to give a certificate of the existence of any fact, such certificate is evidence of the fact contained therein.—*Gurno v. adm'r of Janis.* 330
4. See bonds and notes, 5.
5. When an officer performs any act in pursuance of a duty enjoined on him by law, his official statement of its performance, is evidence thereof: therefore, the protest of a notary public of a negotiable promissory note, stating that such note was presented for payment, &c., is evidence of the facts stated in such protest.—*Moore v. Bank of S. of Mo.* 379
6. In a prosecution instituted under the act concerning "Groceries and dram shops" for suffering spirituous liquor to be drank in the grocery of deft. evidence that deft. sold the liquor, and that the same was drank in his grocery, is presumptive evidence that the liquor was drank in the grocery with the permission of defendant.—*Casey v. The State.* 646
7. The general rule, that a party cannot be allowed to make evidence in his own favor, is not departed from in an action for a malicious prosecution, except upon the ground of necessity. If no other person were present when the felony was committed, the evidence which the defendant himself gave, may be read in evidence in this action.—*Hickman v. Griffin.* 37
8. See Jurors, 5.
9. " New Trial, 4.

EXECUTION.

1. See Sheriff, 1.
2. " Pleading, 3.
3. When an execution, regularly issued, has been returned unsatisfied, in whole or in part, another may be issued at any time thereafter, without resorting to a writ of scire facias to revive the judgment, (See Dowsman v. Potter, 1 Mo. R. p. 518,)—*Lindell v. Benton et al.* 361
4. See Buildings, 2.

FERRIES

See Indictment, 7 and 8.

FORCIBLE ENTRY AND DETAINER.

1. The term "lawful" in the 18th section of the act concerning "forcible entry and detainer," (R. C. 1835, p. 280,) seems to mean nothing more than peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so.—*Michau v. Adm'r of Wilcox.* - - - - - 346
2. A lease does not, of itself, vest the possession of the premises leased, in the lessee, but only gives him a right of possession: and, if the lessee forcibly takes or detains possession, in the manner pointed out by the second section of the act concerning "forcible entry and detainer," he is guilty of a forcible entry and detainer, within the meaning of that act. - - - - - - - - - - - - *ib.*
3. The defendant being convicted of the forcible entry and detainer, while the act of Feb. 6, 1837, was in force, the court properly, in addition to the writ of restitution, gave judgment for double rent for the premises, according to the provisions of that act. McGirk Judge, dissenting on this point. - - - - - - - *ib.*
4. Under the provisions of the 1st sect. of the act of Jan'y 28th 1839, (Laws of Mo. session 1838-9,) relating to *forcible entry and detainer*, the proceedings may be removed to the circuit court by certiorari, at any time before the day appointed by the justice for the hearing of the cause, whether that day by the one named in the summons, or a day to which the trial is adjourned.—*Kincaid et al v. Mitchell.* 223

FRAUD.

1. Fraud constitutes a good defence in law, as well as in equity, and a general allegation of fraud in a plea, without specifying the particulars is sufficient.—*Pemberton v. Steples.* - - - - - - - - - - - - - 59.
2. Fraudulent representations respecting the subject matter of a contract will render the contract void; and if the party defrauded has advanced money or property, or rendered valuable service to the other party by reason of such representations, an action will lie for the recovery of such money or property or the value of such services, and it will not be necessary to prove a demand on the defendant for such property, and his refusal to comply therewith.—*Malone v Harris.* - - 451
3. The provisions of the 3rd sect. of the "act to prevent fraud," (R. C. 1835, p. 283,) do not affect the rights of creditors secured by the 2d sec. of the same act; and, a purchaser at a sale, under an execution in his own favor, does not lose any of the rights of a creditor, under said act.—*King v. Bailey,* - - - 575
4. Possession of personal property by the vendor after the sale, whether the same were absolute or conditional, is fraudulent and void, in *law*, as against creditors, prior or subsequent. - - - - - - - - - *ib.*

GARNISHEE.

1. Where judgment by default has been rendered against a garnishee, for failing to appear and answer interrogatories,—in proceedings under the 17th sec. of the 2d art. of the act relating to attachments, R. C. 1835, p. 86—the plaintiff must establish, by competent testimony, the amount of the indebtedness of such garnishee to the defendant: and final judgment can only be rendered against the garnishee for the amount which he actually owes the defendant, and not for the amount which the defendant may appear to owe to the plaintiff.—*Adm. of Brotherton v. Anderson.* 388
2 Where the justice, in such case, renders final judgment against the garnishee for the amount of the plaintiffs demand against the defendant—without any evidence to establish the amount of the indebtedness of the garnishee to the defendant—the judgment is irregular, and not cured by lapse of time. - - - - *ib.*

INDICTMENT.

1. If the offence charged in the indictment be described in the words of the statute, it is sufficient.—*The State v. Mitchell,* - - - - - - 147
2. Indictment under the 7th sect. of the act concerning grocers, (R. C. 1835, p. 292): first count charged that the deft. exercising the trade and business of a grocer, did

then and there sell spirituous liquors to divers slaves, &c.; second count, that defendant had been and was regularly licensed to exercise the trade and business of a grocer, &c. Held that under the indictment, it was necessary for the state to prove that defendant was a grocer, or acted as grocer, at the time of selling, as the offence of selling liquor to a slave without permit from his master by an unlicensed grocer, or a person who does not keep a grocery, is a different offence from the one charged in the indictment, and the punishment is different.—*Frasier v. The State*, 195

3. An indictment for vending clocks without license, must allege a sale or some other disposition of a clock in the way of trade: but it is not necessary to allege to whom the clock was sold, or the price that was given.—*Page v. The State*, - - 205
4. Indictment for murder:—first count charged that deft. "feloniously, wilfully, of his malice aforethought and by lying in wait" assaulted, &c.—second count, laid the manner and form of killing same as first count, but substituted the words "deliberately and premeditatedly," in lieu of the words "by lying in wait." The jury returned a verdict that defennant was not guilty of murder in either degree in manner and form as charged against him in either count of the indictment, but further found him guilty of manslaughter in the third degree *in manner and form as charged against him in the indictment*. Held, that both under our statute, and at common law, the defendant may be found guilty of manslaughter, on an indictment for murder, as the former offence is included in the latter. The jury by their verdict negatived the malice aforethought; lying in wait; premeditation and deliberation, and found the felonious homicide alone, committed in the manner and form charged. (See The State vs. Watson, 5 V. Mo. R. p. 497.)—*Plummer v. The State*, - 231
5. It is a general rule, that indictments on statutes must state all the circumstances which come into the definition of the offence in the statute, so as to bring the defendant precisely within the act; and the general conclusion, "*contrary to the form of the statute*," will not aid a defect in this respect.—*The State v. Helm*, 263
6. A person indicted for a capital offence may waive his right to a copy of the indictment, and if he pleads and goes to trial without making objection for the want of such copy, he cannot object after verdict.—*Lisle v. The State*, - - 426
7. Indictment for keeping a ferry without a license: Held, that the State was not bound to prove that the defendant had no license; it devolved upon the defendant to show his license.—*Wheat v. The State*. - - - - - - 455
8. An indictment for keeping a ferry without license must specify upon what stream or river the ferry was kept. - - - - - - - - *ib.*
9. It is not necessary for the circuit attorney to subscribe his name to the indictment. *Thomas v. The State*, - - - - - - - - 457
10. The caption forms no part of the indictment.—*Kirk v. The State*, - 469
11. The name of the prosecutor must be endorsed on an indictment for a riot before the bill is returned by the grand jury.—*The State v. McCourtney & others*, 650

INSOLVENCY.

1. See Bonds and Notes, 5.
2. Suit by the assignee of a promissory note against the adm'r. of the assignor, on the ground of the insolvency of the maker: Proof, that the visible property of the maker was not equal in value to the amount of his indebtedness, held, to be insufficient to establish the insolvency.—*Pillard v. Adm'r of Darst*, - - - - 358

INSOLVENT DEBTOR.

See Bonds and Notes, 5.

INSTRUCTIONS.

1. The circuit court is not bound to instruct the jury upon an abstract legal proposition; to entitle a party to an instruction, he must have a suitable case presented by the evidence.—*Nicholas v. The State*, - - - - - - - - - 6
2. Where the circuit court gives erroneous instructions, the error is not cured by the

fact that correct instructions accompanied them, as such erroneous instructions may mislead the jury.—*Hickman v. Griffin*, ... 37
3. It is error in the court to give an instruction that takes the whole case from the jury.—*Morton v. Reed*. 64
4. See Practice, 22.
5. It is error in the court to give instructions to the jury, that refer to their determination questions of law.—*Fugate & Young v. Carter*. 267
6. It is error in the circuit court to give instructions to the jury that involve questions of law; therefore, where the court instructed the jury, that they were to disregard all evidence to explain any ambiguity *patent* on the face of the deed, the Supreme court held such instruction to be erroneous, as it was the province of the court, and not of the jury, to decide whether the ambiguity was *patent* or *latent*. The party should have called the attention of the court to what he conceived to be the ambiguity *patent*, and required the court to instruct the jury, that such ambiguity could not be explained by any evidence dehors the deed.—*Newman v. Lawless*, . 279
7. The judgment of the circuit court will not be reversed, on account of erroneous instructions given, where the party complaining has shown no right of action. *ib*
8. Indictment for murder: The jury having retired to consider of their verdict, returned into court, and asked the court whether, on an indictment for murder, they could find the defendant guilty of manslaughter only? The court told the jury, that they were the judges of the law and the facts: That they might find their verdict as they pleased, and that when the verdict should be rendered the court would decide upon its validity: Held, to amount to an *instruction*, and that having been given *orally*, the judgment must, under the provisions of the act of Feb. 13, 1839, (Laws of Mo. session 1838–9, p. 27,) be reversed.—*Mallison v. The State*. 399
9. See Practice, 35.

JUDGMENTS.

See County Courts, 1.

JURISDICTION.

1. See Constable, 1.
2. The circuit courts have concurrent jurisdiction with justices of the peace when the subject matter in controversy does not exceed in value fifty dollars, (R. C. 1835, title "courts" p. 155, sec. 8; do. title "costs" p. 129, sec. 13 and 14; do. title "justices courts" p. 348, sec. 2, 3 and 4.)—*Talbot v. Greene*. . . . 458
3. The act of Feb. 13, 1839 (laws of Mo. session 1838–9 p. 101) giving justices of the peace jurisdiction in cases of disturbance of religious congregations, is in aid of the 27th sec. of 8th art. of the act concerning crimes and punishments (R.C. 1835, p. 209) making the same offence punishable in the circuit court by indictment.—The jurisdiction of the circuit court and justices of the peace, in such cases, is concurrent.—*Clay v. The State*, ... 600

JURORS.

1. The act of Feb. 6, 1837, (Laws of Mo., session, 1836–7, p. 70) for summoning petit jurors for St. Louis county, is cumulative.—*McGunnegle v. The State*. . 367
2. The 4th sect. of the act incorporating the "central fire company," of St. Louis, (Laws of Mo. session 1836–7, p. 172,) exempting the "active and efficient" members of that corporation from serving on juries, is neither unconstitutional, nor, in this instance, repugnant to the general policy of the law. . . . *ib.*
3 In criminal cases the state may challenge, peremptorily, three jurors.—*Mallison v. The State*, ... 399
4. See New Trial, 2.
5. It is the peculiar province of the jury to weigh the evidence and determine its worth.—*Dooly & Kirkland v. Jennings*, ... 61

JUSTICES COURTS.

1. See Evidence, 2d subdivision 1.
2. " Constable 1.
3. In proceedings under the 10th sec. of 1st art. of the act relating to Justices Courts, (R. C. 1835, p. 349) giving justices of the peace jurisdiction out of their own townships in certain cases, it need not appear from the docket of the justice, that the necessity of exercising the jurisdiction existed, but that fact may be given in evidence on the trial of the cause.—*Lutes & Dulaney v. Perkins*, - - - 57
4. Whenever it becomes necessary for a justice of the peace to empower a suitable person to execute process, under the 26th sec. of 2d. art. of the act relating to Justices Courts (R. C. 1835, p. 352,) the justice is not restricted in his choice to an inhabitant of his own township.—*Lutes & Dulaney v. Perkins*, - - - 57
5. Where there is a judgment of non suit rendered, in a suit before a justice of the peace, and that judgment is set aside, and a new trial granted, and judgment again rendered against plaintiffs, an appeal from such judgment may be taken, although more than ten days may have elapsed since the rendition of the judgment of nonsuit; and it makes no difference whether the suit is founded on an instrument of writing or not.—*Fenton v. Russell & Lindley*, - - - - - 143
6. See Garnishee, 1 & 2.
7. " Practice, 28.
8. " Jurisdiction, 2.

LEASE.

See Forcible Entry and Detainer, 2.

LIEN.

1. In proceedings under the act concerning "buildings," (R. C. 1835, p. 107,) to enforce a lien, the only case in which the land on which the building has been erected, and a certain space around the building, can be made subject to the lien of the workman, is where the owner of the land has caused the building to be erected.—*Sibley et al v Casey & Biddle*, - - - - - - 164
2. Therefore on a *scire facias* issued against the owner of the land to show cause why execution should not issue against the land, it is a good defence, that the land on which the building was erected, was at the time, &c. the property of defendant, and that deft. did not cause the building to be erected. - - - *ib.*
3. This act was not intended to exempt mechanics, &c. from the operation of the established rules of law in relation to contracts: Therefore, where one of the defendants pleaded *coverture*, at the time, &c. such plea was held good. - *ib.*
4. See Boats & Vessels, 13.
5. A person cannot acquire a lien upon land purchased by another by, the voluntary and unauthorized payment of the purchase money, as one man cannot make another his debtor by paying money for him, without being requested so to do by the latter. *Truesdell v. Callaway*, - - - - - - - - - - - - 605
6. See Buildings, 2.

LIMITATIONS

1. In order to take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time, (coupled with the original consideration,) or an express promise to pay it, must be proven to have been made within the time prescribed by the statute.—*Davis v. Herring*, - - - - - - 21
2. Def't unconditionally promised the agent of plaintiff several times, to renew certain notes held by plaintiff on defendant, the notes were not exhibited at the times, nor their amounts stated: Held, to be a sufficient promise to take the case out of the statute of limitations - - - - - - - - - - - *ib.*
3. The 2nd article of the statute of limitations, (R. C. 1835, p. 393-4,) does not embrace actions of covenant, consequently the limitation of ten years is not a good

plea to an action of covenant, brought upon a sealed instrument of writing for the payment of money. The limitation of twenty years, however, is a good plea, and is embraced within the provisions of the 2nd section of 4th article of the act.—*Pennington v. Castleman.* - - - - - - - - 257.

MALICIOUS PROSECUTION.

1. The general rule, that a party cannot be allowed to make evidence in his own favor, is not departed from in an action for a malicious prosecution, except upon the ground of necessity. If no other person were present when the felony was committed, the evidence which the defendant himself gave may be read in evidence in this action.—*Hickman v. Griffin.* - - - - - - - - 37.
2. In an action for malicious prosecution the real point of inquiry for the jury is, whether there was probable cause for the prosecution, and not whether the defendant had probable cause to believe the plaintiff guilty, or whether he had probable cause to institute the prosecution. - - - - - - - *ib.*

MANDAMUS.

A peremptory mandamus cannot issue on the return of a rule to show cause why a mandamus should not issue. &c. A mandamus must have first issued before a peremptory mandamus can be granted.

MILLS AND MILL DAMS.

Proceedings under the act concerning mills and mill dams, (R. C. 1835, p. 405–6–7.) H. and S. each, on the same day, presented separate petitions, to the circuit court, for leave to build different mill dams across the Lamine river. The jury assessed damages, on the petition of H. to ten dollars by inundation of the land of S. On the petition of S. they returned that no land would be inundated, or other injury done, by the erection of his dam. The site of H. was a mile and a half higher up the stream than the site of S. Both cases were heard by the court at the same time. Held, that the circuit court did not improperly exercise its discretion in granting the petition of S. and refusing that of H.—*Hook v. Smith.* - - 225.

MORTGAGE.

1. A deed of mortgage with a power of sale in the mortgagee is valid in this state; and a sale by the mortgagee if made in pursuance of the provisions of the deed, vests in the purchaser a valid title.—*Carson v. Blakey et al.* - - 213.
2. In proceedings under the act concerning "*mortgages*," all persons having an interest in the mortgaged property may join in the petition for the foreclosure and sale of the same. The proceedings under this act more resemble those of a court of equity, than those of a common law court.—*Milam and others v. adm'r. of Bruffee.* 635.

NEW TRIAL.

1. It is no ground for a new trial, that the party "was surprised by the cause coming on sooner than he expected; he believing the cause was set for trial on the third, instead of the first day of the term."—The party was guilty of negligence in not examining the docket, and ascertaining the time when the cause was set for trial.—*Stout v. Calver.* - - - - - - - - - 254.
2. The incompetency of a juror is no ground for a new trial, when such incompetency was known to the party before the juror was sworn in chief, and no objection was then made.—*Lisle v, The State.* - - - - - - - 426.
3. An affidavit of newly discovered testimony, on a motion for new trial, should contain an averment of due diligence.—*Smith v. Matthews.* - - - - 600.
4. The judgment of the circuit court, in refusing to grant a new trial, will not be reversed by the appellate court, on the ground that the verdict was without evi-

dence &c unless the evidence greatly preponderated in favor of the party seeking the reversal.—*Dooly and Kirkland v Jennings.* . . . . . 61.

NON SUIT.

1. See Justices courts. 3.

NOTARY PUBLIC.

See Evidence, last subdivision. 5.

NOTICE.

1. See evidence first subdivision. 1.
2. The notice required to be given by a security to the person having the "right of action," to commence suit against the principal debtor, under the povisions of the 1st sect. of the act "concerning securities," (R. C. 1835 p. 574) may be given verbally.—*Bolton v. Lundy.* . . . . . 46.

OFFICERS.

1. See Taxes. 5.
2. In an action of trespass against an officer it is not necessary to declare against him in his official capacity.—*Davis v. Cooper.* . . . . . 148.
3. See pleading. 3.
4. " Sheriff. 1 & 2.

PATENT.

See Pleading. 13.

PARTNERS.

1. In a suit by stangers against persons, charging them as partners, it is not necessary to prove an actual partnership, but only to fix a liability; for a man may not be a partner in fact, yet by his acts and language he may render himself *liable* as a *partner.—Campbell and Mason v. Hood.* . . . . . 211.
2. But when the partners are plaintiffs, or when the suit is between the partners, then a partnership in fact must be proven. . . . . *ib.*

PARTNERSHIP.

See Bonds and Notes, 1.

PEDLARS.

The 12th section of the act concerning *pedlars*, (R. C. 1835, p. 429,) requires a license to peddle clocks, whether manufactured in the state or not.—*Page v. The State.* 205

PETITION IN DEBT.

1. In petition in debt brought by a mercantile firm, consisting of several partners, on a note executed to them in the name of the firm, it must be averred in the petition, that the note set out was executed to plaintiffs by that name.—*Dyer & Mason v. Sublett & Campbell.* 14
2. In petition in debt brought by a mercantile firm, consisting of several partners, on a note executed to them in the name of the firm, it need not be averred in the petition that the note set out was executed to the plaintiffs by that name.—*Lee & Remington v. Hunt & Paddock.* 163

3. A bond, signed by a partner in the name of the firm, may be described, in a petition in debt, as the bond of any one of the partners; our statute permitting the obligee to sue as many of the obligors as he thinks proper.—*Griffin & Kinote v. Samuel*, - - - - - - - - - - - - - - - - 50
4. In an action by petition in debt, where there has been no personal service of the summons, the defendant is entitled to a continuance as a matter of course.—*Kinsey v. Watson*, - - - - - - - - - - - - - - 209
5. See Practice, 27.
6. In a suit by petition in debt, brought by the payee of the note, to the use of the assignee, the plaintiff cannot amend by striking out the endorsements, with a view of showing himself the legal owner of the note, as the form of the action declares that he is not the legal owner of the note. (See Jeffries v. Oliver, 5 Mo. R p. 433.)—*Langham to use of Ortley v. Lebarge*. - - - - - - - - - 355
7. Petition in debt will not lie on a note which does not show on its face when it became due. To maintain suit on such a note it is necessary to make an averment of the time when the note became due, and no such averment can be made in this form of action.—*Curle v. McNutt*, - - - - - - - - - - - 495
8. Petition in debt will not lie on a bond containing other stipulations than those for the payment of money or property: Therefore, this action cannot be maintained on a bond given for the hire of slaves, and containing besides, a promise to pay a certain sum of money at a certain time, a stipulation for clothing the slaves, paying their taxes, and for returning them at the expiration of the period for which they were hired.—*Curle v. Pettus*, - - - - - - - - - - - - 497

PLEADING.

1. A general allegation of fraud in a plea, without specifying the particulars, is sufficient.—*Pemberton v. Staples*. - - - - - - - - - - 59
2. In an action of trespass against an officer it is not necessary to declare against him in his official capacity.—*Davis v. Cooper*, - - - - - - 148
3. Declaration in trespass—plea, that the acts charged &c., were done under the authority of an execution delivered to defendant as deputy sheriff, &c. Replication, that plaintiff had paid the full amount of the execution, and that defendant acknowledged full satisfaction of the execution by giving his receipts therefor, &c. Held, that the replication was bad in not averring that plaintiff had paid and satisfied the execution, &c., and in not stating how much money he had paid, and further, in not averring that the trespass was committed after the payment of the money due on the execution. - - - - - - - - - - - *ib.*
4. But the defendant having withdrawn his demurrer to the replication, and the issue joined having been found against him, the defect in the replication is cured by the verdict. - - - - - - - - - - - - - - - *ib.*
5. Covenant by A & B against C as adm'r of D upon an agreement of D to deliver to plaintiffs at stipulated periods, 1000 saw logs. Plea, that D in his life time delivered 200 of the logs, &c., and as to the residue, was prevented from delivering &c., by B, one of the plaintiffs who on &c., assaulted and mortally wounded D, by means of which &c., D died, and so was prevented from fulfilling his covenant. Plea demurred to and demurrer overruled. Held, that the plea was good.—*Jarrell et al v. Adm'r. of Cockey*. - - - - - - - - - - 159
6. See Slander, 2, 3, 4 and 5.
7. A plea must state facts and not the belief of the party of the existence of those facts.—*Thomas v. Van Doren & others*, - - - - - - - 201
8. See Assumpsit, 3.
9. In an action on a negotiable note by the payee against the maker, a plea in bar, which amounts to an averment or admission of fraud on the part of the plaintiff, defendant, and a stranger, with a view to defeat the rights of the creditors of the latter, is bad, as tending an issue foreign to the case.—*Moore v. Thompson*. - 353
10. See Boats and Vessels, 2.
11. Action founded on two promissory notes executed by defendant to plaintiff, payable at one and two years. Plea: that at the time of the execution of the notes, plaintiff entered into a written agreement with defendant, that if, at the time of the maturity of the notes, it should not be convenient for the defendant to pay the same, plaintiff should wait the convenience of defendant; in consideration of which,

defendant agreed to pay interest; and that it was not convenient for defendant to pay. Held, to be no bar to the action; and, that if defendant had sustained any damage, by being compelled to pay before it was convenient, he must sue upon the agreement. (McGirk Judge, dissenting on this point.)—*Atwood v. Lewis.* 392

12. The plaintiff, in his demurrer to the defendant's plea, omitted to crave oyer of the agreement, of which profert was made in the plea; the circuit court permitted him to correct the mistake by interlining the demurrer. Held, that the court did not err, in this respect, as this was not amendment of the demurrer, but rather, an interlineation of a part of the record, which had been carelessly omitted before the demurrer was filed, which did no injury to the defendant, as he happened to have the instrument in court. - - - - - - - - - - - *ib.*

13. A plea admitting the existence of a patent but denying its validity is bad as, the plea refers a matter of law to the jury.—*Bennett v. Martin,* - - - - 460

14. In a suit against the Mayor, Aldermen, &c. of the city of St. Louis, on Treasury Warrants of that city, the plaintiff should allege in his declaration a demand on the city Treasurer, and not on the defendants.—*Ferguson v. Mayor &c. of St. Louis.* - - - - - - - - - - - - - - - - 499

15. A plea alleging an assignment of the instrument sued on, by the plaintiff to a third person, should state the form of the assignment, for if the instrument was verbally assigned the assignee could not sue upon it in his own name.—*Thomas v. Cox,* - - - - - - - - - - - - - - - - - 506

16. A plea of surrender of a term and acceptance thereof, in an action of covenant, should state that plaintiff accepted the same in discharge of the covenant, as nothing will discharge a covenant but a performance or discharge under seal. - *ib.*

17. See Averments.

PRACTICE.

1. The want of service of a writ is cured by appearance and defence.—*Griffin & Kinote v. Samuel.* - - - - - - - - - - - - - - - - 50

2. If the circuit court, sitting as a jury, finds a defective verdict, its judgment will not be reversed in the appellate court, unless a motion was made in the court below to arrest the judgment and overruled. - - - - - - - - - - *ib.*

3. Appeal from a justices court: Defendant appeared in the circuit court and moved to set aside the judgment of the justice. Held not to be such an appearance and defence as will cure the want of service of the summons, and that the circuit court in such case, (there having been no service of the summons,) erred in entering up judgment against defendant.—*Lutes & Dulaney v. Perkins.* - - - - 57

4. It is error in the court to give an instruction that takes the whole case from the jury.—*Morton v. Reed,* - - - - - - - - - - - - - - 64

5. See Administration, 1.

6. The Supreme court will not disturb the verdict of a jury, or that of the circuit court sitting as a jury, where the evidence in the case has not been preserved in a bill of exceptions, and no motion has been made in the court below for a new trial. —*Thompson et al v. Child.* - - - - - - - - - - - - - - 162

7. Where a demurrer was filed to the declaration, but no judgment entered on the demurrer and issue afterwards joined on a plea to the action, the Supreme court will presume that defendant withdrew his demurrer.—*Sweeney v. Willing,* - 174

8. The rule, that when a demurrer is overruled and not withdrawn, it remains on the record a confession of the facts set forth in the pleading demurred to, does not apply where the court does not give judgment on the demurrer but suffers the parties to go before a jury on issues made up under the direction of the court; such subsequent action of the court amounts to an implied withdrawal of the demurrer.—*Dickey et al v. Malechi.* - - - - - - - - - - - - - - 177

9. The introduction of incompetent testimony, is as much an error of law as the giving of wrong instructions, and it is a matter which the Sup. court will look into. *ib.*

10. An objection to a plea *puis darrien continuance*, that it was not pleaded in proper time, cannot be taken advantage of by the plaintiff, on demurrer; but it should be made on motion to set aside the plea.—*Thomas v. Van Doren & others,* - 201

11. It rests, however, in the discretion of the court, to receive such a plea or not, after more than one continuance between the time the matter of the plea arose, and the putting in of the plea. - - - - - - - - - - - - - *ib.*

12. Where in a change of venue in a criminal case, the record sent up is imperfect, the court will not for that reason, discharge the defendant from his recognizance, especially as the change of venue in such cases, is on the application of the defendant.—*Laporte v. The State*, - - - - - - - - - - - 208
13. The usual and regular mode of proceeding in such cases, is for the circuit attorney to suggest a diminution of the record, and move for a writ of certiorari, directed to the circuit court of the county from which the change of venue was taken, to send up the record. - - - - - - - - - - - - - *ib.*
14. A writ of error will not lie on the decision of the circuit court in overruling a motion to discharge a defendant from his recognizance, such not being a final decision in the cause. - - - - - - - - - - *ib.*
15. If a plaintiff includes a person in his suit—whether ex-contractu or ex-delicto—against whom there is no evidence, the court may direct the jury to find a verdict as to such person, and he may then be used as a witness. But there must be an entire want of testimony to justify the court in allowing a party this privilege.—*Campbell & Mason v. Hood.* - - - - - - - - - 211
16. To justify a court in setting aside a verdict, merely on the ground that it is unsupported by evidence, the weight of testimony must greatly preponderate against the verdict. - - - - - - - - - - - *ib.*
17. The Sup. court will suffer verdicts, whether found by the circuit court or by a jury acting under the direction of the court, to stand, unless it is obvious that injustice has been done.—*Craig v. Maupin*, - - - - - - - 250
18. To enable the Sup. court to determine whether or not the circuit court has erred in its judgment, it is necessary to preserve the evidence and proceedings in a bill of exceptions.—*Gale v. Pearson*, - - - - - - - - - 253
19. See New Trial, 1.
20. Although it is error in the circuit court to enter judgment, without a finding upon all the material issues in the cause, yet, the finding may be in general terms; as, "we the jury find for the plaintiff, and assess his damages to &c."—*Stout v. Calver*, - - - - - - - - - - - - - - 254
21. It is error in the circuit court to suffer law books to be taken to the jury, and to leave them to construe the law for themselves. It is the duty of the court to deliver the law governing the cause, to the jury in the form of instructions, and not to leave law books in their possession, to find what is the law.—*Barker v. Pool.* 260
22. See Venue, 3.
23. " Instructions, 6 and 7.
24. The judgment of the circuit court will not be reversed on account of a mere irregularity, by which, the party complaining, has sustained no injury.—*Payne v. Collier & Pettus*, - - - - - - - - - - - - 321
25. It is a sufficient compliance with the 8th sect. of the act regulating "Practice at law," (R. C. 1835, p. 451,) if the original writ requires the def't. to appear before the "judge of the circuit court," &c, to answer the "demand," &c., instead of, to appear before the "circuit court," &c., to answer the "complaint" &c. - *ib.*
26. The 4th section of the act relating to "Practice (Laws of Mo. session 1838–9, p. 99,) providing, that "all actions at law founded on bonds, bills, or notes, in the circuit court, shall be tried and determined at the return term, if the defendant shall have been personally served with process twenty days before the commencement of the term," does not apply to actions by "Petition in Debt "–*Southack v. Morris* 351.
27. The 7th section of the 5th article of the act relating to justices, courts, (R. C. 1835, p. 359,) is applicable only to suits instituted before a justice of the peace.—*Ferguson a. Huston.* - - - - - - - - - - 407.
28. See new trial. 2.
29. A suit instituted without any authority, from the person in whose name it is conducted, should be dismissed; and upon a suitable suggestion of facts, the Attorney will be required to show some authority either verbal or written, for conducting the suit.—*Keith v. Wilson.* - - - - - - - - - - - - 435.
30. A witness cannot, by contumacious behaviour, deprive a party of the benefit of his testimony, if there be no laches or connivance on the part of the person who has a right to his testimony: Therefore, when a witness who had been sworn in the cause, and ordered by the court to keep without the hearing of the witnesses under examnation, disobeyed the order and remained within hearing, and this without the consent or connivance of the party to the suit, such party did not thereby lose the

benefit of the testimony of such witness, and the Circuit Court erred in refusing to permit the witness to give testimony in the cause. - - - - - - *ib.*
31. See continuance.
32. The judgment of the Circuit Court will not be reversed, on the ground that the verdict was against the evidence, unless it clearly appears that the evidence did not warrant the finding of the jury, (See Singleton v Mann. 3. Mo. R. p. 464. Oldham v Henderson 4. Mo. R. p, 295. Martin v Withington ib. p. 518. Mulliken v Greer, 5, Mo. R. p. 489. Steel v McCutchen, ib. p. 522. Vaughn v Montgomery ib. p. 529.)—*Ex'rs, Shobe v. Morris.* - - - - - - - - - - - - 489.
33. Where the issue tendered by one of several pleas was immaterial, and the demurrer thereto improperly over ruled, and no issue was joined on such plea, and the jury found for the plaintiff, the issue which they erroneously supposed to be joined on this plea, and the verdict was fully sustained by the finding of the other issues for the plaintiff, the Supreme court refused to reverse the judgment on account of the finding of the jury on such supposed issue. It was the fault of the defendant to tender such an issue, and it did not appear that he sustained an injury by such finding.—*Kyle v. Hoyle.* - - - - - - - - - - 526.
34. Where it is necessary to prove a demand and refusal, an instruction that the refusal must be of a *definite* character is erroneous, as it would be in the power of the defendant, by evasive answers and equivocal conduct, to render it impossible for the plaintiff to prove a *definite* refusal. - - - - - - - - - - - *ib.*
35. Action of Trespass—defendants pleaded *severally* liberum tenementum, and *jointly* liberum tenementum as to one, and license as to the other. Plaintiff inadvertently failed to reply to the last plea in term time, and at the next term judgment was entered for defendants: Held, that as the last plea required two replications, which could not be filed without leave of the court, and especially as the plea was unnecessary, the court should have permitted the plaintiff to reply at the subsequent term.—*Mathews v, Boas and Murphy.* - - - - - - - - 597.
36. It lies upon the party, seeking a reversal of the judgment of the circuit court, to show in what that court erred.—*Dodson v. Johnson.* - - - - - 599.
37. An affidavit of newly discovered testimony, on a motion for a new trial, should contain an averment of due diligence,—*Smith v. Matthews.* - - - - 600.
38. See Trespass. 7.
39. In proceedings under the act concerning "mortgages," all persons having an interest in the mortgaged property may join in the petition for the foreclosure and sale of the same. The proceedings under this act more resemble those of a court of equity, than those of a common law court.—*Milam and others v. adm. of Bruffee.* 635.
40. See appeal. 6.
41. " Jurors. 5.

PRESUMPTIONS.

1, See Taxes–5.
2. " Trespass. 7.

PROTEST.

See Evidence last subdivision. 5.

PUBLIC LANDS.

1. Where there has been an express reservation of lands for sale by the U. S. and the register and receiver sell the lands so reserved, there can be no doubt; that their acts would at least be held void in any suit in which the U. S. might be a party—But *quere*, are such sales mere nullities, and could a defendant, resting on a mere naked possession show them to be such?—*Hunter v. Kemphill.* - - - - 106.
2. The mere designation of a claim to land upon the books of the register of the land office by a stranger, is not a sufficient compliance with the provision of the act of Congress of 3rd March 1811, to authorize the register to withhold such land from sale. - - - - - - - - - - - - - - - *ib.*
3. Whatever irregularites may be committed by the agents of the U. S. in the dis-

posal of the public domain, their acts are to be held *prime facie* valid, and no third person can be allowed to impeach them, unless they should be disclaimed by the U. S. Whatever is therefore merely avoidable, when the agents had a general power to sell, and when there has been no express reservation of the land sold, the sale is good as to all the world except the U. S. or those claiming under them, and no one standing on a naked possession, shall be allowed to question the validity of such sale, - - - - - - - - - - - - - - - - *ib.*

4. It does not follow, that because the register of the land office was not present when certain lands were sold, he necessarily performed that act by deputy. Before that question could be determined, it would be necessary to look into the nature of the act performed. If a mere ministerial or clerical act, it might be performed by deputy. If a Judicial act—and the register does for some purposes, and in some matters act as a Judicial officer—(as in granting pre-emptions,) the act could not be performed by deputy. - - - - - - - - - - - - *ib.*
5. The purchaser of public lands of the U. S. is governed, in the boundaries and contents of the land purchased, by the act of Congress of 11th Feb'y. 1805, "concerning the mode of surveying the public lands of the U. S." which act provides, among other things, that each section or sub-division of section, the contents whereof have been returned by the surveyor general &c., shall be held and considered as containing the exact quantity expressed in such returns, and that the boundary lines actually run and marked in the surveys returned &c., shall be established as the proper boundary lines of the sections, and sub-divisions of sections.—*Campbell v. Clark.* - - - - - - - - 219.
6. The act of Congress, of 11th Feb'ry 1805, in this respect, declares, in express terms, the rule of the common law, viz: That where land is sold by metes and bounds, the purchaser so takes it, be the quantity more or less; and if the tract contains less than it is sold for, he is without remedy, unless he can prove that the vendor was guilty of fraudulent misrepresentation. - - - - - - - *ib.*
7. Persons cutting timber on the lands of the United States, not being actual settlers, are mere trespassers, and do not thereby acquire any property, either general or special, in the timber.—*Turley v. Tucker.* - - - - 583.
8. Trespassers on the lands of the United States, occupy the same position with trespassers on the lands of private individuals. (James and Massy v. Snelson, 3. Mo R. p. 393 overruled.) - - - - - - - - *ib.*

RECOGNIZANCE.

1. A recognizance to appear on the *first* day of the term, is forfeited by the failure of the cognizor to appear on that day. His appearance on a subsequent day of the term will not save his recognizance.—*Shore and others v. The State.* - 640.
2. See criminal practice. 7.

RECORDS.

1. The Supreme court will take notice of such facts only, as appear on the record.—*Nicholas v. The State.* - - - - - - 6.
2. See variance.
3. " Criminal practice.

RELEASE.

A release from one obligee is a release from all the obligees.—*Jarrell v. adm. of Cockey.* - - - - - - - 159.

RIGHT OF WAY.

A right of way, *from necessity*, from one part of the claimants land *to* another part of the same tract, over the land of another, cannot exist.—*Cooper v. Maupin.* 624.

SALE OF CHATTELS.

1. Defect or unsoundness in a chattel sold, cannot be set up in bar of a recovery on a note given for such chattel, unless the vendee, on the discovery of such defect or unsoundness, returns or offers to return the chattel purchased, or shews it to be valueless.—*Ferguson v. Huston.* - - - - - 407.
2. See warranty.
3. " Contracts.

SCIRE FACIAS.

1. A scire facias cannot issue to revive a jndgment confessed before the clerk of the circuit court in February 1820. The clerk, at that period, having no power to take confessions of judgment.—*Phelps v. Hawkins,* - - - - - - - 197
2. See Execution, 3.

SECURITY.

See Notice, 2.

SHERIFF.

1. The 52d section of the act of the General Assembly "to regulate executions," (R. C. 1835, p. 260,) renders sheriffs liable as well for negligent, as for voluntary escapes. The word "permit," in the section, includes escapes both negligent and voluntary.—*Warburton & King v. A Wood et al,* - - - - - - - 8
2. An execution and venditioni exponas, are a sufficient justification of a sheriff in an action of trespass against him, for levying upon and selling plaintiffs property, but if the sheriff wishes to offer the whole record in evidence, there is no good reason why the court should refuse to permit him to do so.—*Davis v. Cooper* - 148
3. See Officer, 2.

SLANDER.

1. See Variance 1 & 2.
2. Action of slander—plea, that the slanderous words were spoken on the authority and information of one S. and that at the time of speaking the words, defendant gave the name of the author. Held to be good plea of justification.—*Church v. Bridgman and Wife.* - - - - - - 190.
3. But to sustain this plea, the defendant is bound to prove that the words were actually spoken by the person whose name was given up as the author. - *ib.*
4. Where the slander imputed was in relation to the crime of passing counterfeit money, there must be a colloquium in the declaration, averring that deft. spoke the words of and concerning plaintiff's commission of the offence of passing counterfeit money, knowing the same to be counterfeit. - - - - - *ib.*
5. The want of this averment in the declaration, is not aided by the innuendo. *ib.*

SLAVES.

1. Under the 41st. sect. of 7th Art. of the act regulating "practice and proceedings in criminal cases," (R. C. p. 497,) the owner, and not the temporary master, of a Slave convicted in cases therein specified, is the proper person to pay the costs of convictien. The words "owner or master are most probably synonymous, and mean the owner and not the temporary master,—*Reed v, Cir. C. of Howard co.* - 44.
2. A change of venue cannot be granted on application of the *owner* of a slave indicted for murder. The slave should petition in person for such change.—*Fanny v. The State.* - - - - - - - - - - 122.
3. See Crimes and Punishments. 3 & 4.
4. " Indictment. 2.

When a person hires a slave for a certain time, and agrees to return the slave at the end of that time, and the slave, in the mean time, runs away, without the fault of the hirer, who has used due diligence to prevent the escape, and retake the slave, but without success, he will only be liable for the hire, and not for the return of the slave.—*Elliott v. Bobb.* - - - - - - - - - - - 323

Counsel, assigned by the court to slaves for their defence in criminal prosecutions, have no claim upon the masters of such slaves for compensation for professional services, unless there be an understanding to that effect between such counsel and masters.—*Manning v. Cordell.* - - - - - - - - - - - 471

SPANISH GRANTS.

1. Plaintiff claimed under one M. who, it was proved, prior to 20th Dec. 1803, had enclosed and cultivated the land in controversy; and, in support of his claim, relied upon the acts of Congress of 13 June, 1812, "making further provision for settling the claims to land in the territory of Missouri": also the acts of April 12, 1814, and April 24, 1816, granting pre-emption rights in certain cases. The defendant claimed under a confirmation, by the recorder of land titles, to the widow of said M.—Held, that as the plaintiff had failed to prove that the land, in controversy, was either a town or village lot, out lot, common field lot, or commons, within the provisions of the act of June 13, 1812, and had shown no compliance with the said pre-emption acts, nor any grant from either the Spanish or French governments, or confirmation by a board of commissioners, he could not prevail against the defendant, whose confirmation concluded all persons not able to show a complete Spanish or French grant, or a prior confirmation by a board of commissioners, or bring themselves within the provisions of said acts of Congress.—*Newman v. Lawless.* 279

2. Under the act of June 13, 1812, it is not necessary that the claimant should have inhabited &c., the lot claimed, at the time of the passage of that act; but inhabitation, &c., prior to 20th Dec. 1803, is sufficient to pass the title from the United States to the claimant, without any regard to the fact whether such inhabitation had continued up to the passage of the act.—*Gurno v Adm'r. of Janis.* - 330

3 The act of Congress of June 13, 1812, amounts to a statutory confirmation of the town or village lots, &c., in the respective towns and villages therein mentioned, to all persons who come within the provisions of the act; and the owners or claimants of such lots, &c., have only to show, whenever their rights or claims to such lots are in litigation, that their cases are embraced by said act. Tompkins Judge dissenting. - - - - - - - - - - - - - - - - - *ib.*

4. See Evidence, 2nd sub-division, 2 and 3.

5. The rules of the common law are inapplicable to the construction of grants and concessions of the royal domain, during the Spanish government of Upper Louisiana.—*Bird v. Montgomery.* - - - - - - - - - - - - - 510

6. In the case of a complete grant, of a part of the royal domain, by the crown of Spain, the dominion retained by the King was purely political, and not proprietory. - - - - - - - - - - - - - - - - *ib.*

ST. CHARLES COMMONS.

1. The claim of the inhabitants of the town of St. Charles to the commons adjoining the town, conceded to them by the Lt. Governor's of Upper Louisiana in 1797, and 1801, and surveyed by the Surveyor General of that province in 1804, was confirmed by the act of Congress of June 13th, 1812.—*Bird v. Montgomery.* - 510

2. In the case of a complete grant, of a part of the royal domain, by the crown of Spain, the dominion retained by the King was purely political and not proprietory. In the case of the St. Charles commons, however, there was no such complete grant, but a mere concession or inchoate title had been made, and the King of Spain undoubtedly retained so much proprietory right as would have authorised him to restrict or modify, though not, perhaps, entirely to abrogate, the commons. This proprietory interest passed to the United States, and they parted with all their interest by the act of June 13th, 1812. - - - - - - - - - - - *ib.*

ST. LOUIS COMMONS.

The provisions of the act of March 18th, 1835, authorising the sale of the St. Louis commons, are directory, and not conditions precedent to the exercise of the power therein vested in the Mayor and board of Aldermen of the city of St. Louis: Therefore in an action of covenant brought by the Mayor, Aldermen and citizens of the city of St. Louis, on an indenture of lease of a part of the commons, the defendant is estopped from denying that the preparatory steps required by said act were complied with.—*City of St. Louis v. Morton.* - - - - - - - - 476

STATUTES.

1. No statute shall be construed in such manner as to be inconvenient or against reason.—*Fanny v. The State.* - - - - - - - - - - - - - 123
2. See Indictment. 1.

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Petition in debt,	(" " " 449,)	14, 50, 163, 209, 351, 355, 495, 497
Practice at Law,	{ " " " 451, Laws of Mo. 1838-9 p. 99, }	321, 351
Practice and proceedings in criminal cases,	(R. C. 1835, p. 481, 485-6, 497,)	44, 122, 426, 650
Revenue,	(Laws of Mo. 1826-7, p. 49, 50,)	64
Securities,	(R C. 1835, p. 574,)	46
Wills & testaments,	(" 1825, " 792,)	177

STATUTE OF FRAUDS.

1. The provisions of the 3d sect. of the "act to prevent fraud," (R. C. 1835, p. 283,) do not affect the rights of creditors secured by the 2d sect. of the same act; and a purchaser at a sale, under an execution in his own favor, does not lose any of the rights of a creditor, under said act.—*King v. Baily.* - - - 575

A person who takes a conveyance of land with notice of the legal or equitable title of another to the same land, will be held a trustee for the benefit of the other, and will not be permitted to avail himself of the statute of frauds, on the ground that the agreement, under which he took the conveyance, was not in writing.—*Truesdell v. Callaway*, - - - - - - 605

SUPERSEDEAS.

See Administration, 4.

TAXES.

The Auditor's certificate required—upon the sales of lands for taxes—to be transmitted to the recorder of the county wherein the real estate is situated, by the provisions of the 11th sec. of the act of Jan'y 3d, 1827, for levying, assessing and collecting state and county taxes, is only evidence of his own acts.—*Morton v. Reed*, 64

Although the certificate of the auditor, that the provisions of the law have been complied with, is rendered by the act *prima facie* evidence of the facts contained in such certificate, yet the law relates solely to the acts of the auditor, and to make the certificate even *prima facie* evidence of such facts, it is necessary that it should contain a detailed statement of the performance of the particular duties enjoined by law upon the auditor, - - - - - - - *ib.*

Where the certificate merely states in general terms, "that the provisions of the law in such cases made and provided, have been complied with," it is no evidence that the pre-requisites of the law—even so far as relates to the duties of the auditor—have been complied with; indeed such a certificate proves nothing, - *ib.*

In the case of lands sold for the non-payment of taxes, the party claiming under the sale must show that all the pre-requisites of the law have been strictly complied with, - - - - - - - - *ib.*

The general rule, that all public officers are presumed to have done their duty until the contrary appears, is limited and restrained by the rule, that in all summary and *ex-parte* proceedings, the party claiming under them must make strict proof of the performance of every pre-requisite of the law. The former may be the general rule, and the latter the exception, but the former rule never was applicable to cases like the present, - - - - - - - *ib.*

TRESPASS.

In an action of Trespass against an officer, it is not necessary to declare against him in his official capacity.—*Davis v. Cooper*, - - - - 148

See Sheriff 2.
" Pleading 3.
" Costs, 2.
" Public lands, 7 & 8.

A lessor cannot maintain an action of trespass *quare clausum fregit*, while there is a tenant in possession.—*Roussin v. Benton*, - - - - 592

Where the declaration in trespass contains two counts, one under the statute, and the other at common law, and the verdict is general, the court will presume that the verdict is for single damages only.—*Cooper v. Maupin*, - - - 624

TROVER.

The possession sufficient to maintain the action of trover, must be a lawful possession, one trespasser or wrong doer cannot maintain trover against another.—*Turley v. Tucker*, - - - - - - - - 583

TRUSTS.

person who takes a conveyance of land, with notice of the legal or equitable title of another to the same land, will be held a trustee for the benefit of the other, and

will not be permitted to avail himself of the statute of frauds, on the ground th the agreement under which he took the conveyance was not in writing.—*Truesd v. Callaway*, - - - - - - 60

VARIANCE.

1. In an action for slander, the pltff. alledged in his declaration, that the slandero words were spoken in relation to his testimony in a suit, in which S. was pltff. a H. deft. and offered to substantiate this allegation by the record of a suit betwe S. and W. pltff. and H. deft. the court held that there was no material variance the record, as the suit was in fact between S. as pltff. and H. as deft. althou there was still another pltff. and the record not being the foundation of the actio and not set out by its tenor, and the material point of enquiry being the existen of a judicial proceeding in which perjury might be committed, evidence aliun was admissible to identify the record offered in evidence with the one referred to the declaration.—*Hibler v. Scrvoss*, - - - - - 2
2. But where the deft. in his plea of justification, alleged the existence of a suit which pltff. had committed perjury between S. and S. as pltffs. and H. as deft. a offered in evidence the record of a suit between S. and W. as pltffs. and H. as de the court held that the variance was material, and the record properly excluded, the deft. having misdescribed the suit no proof could identify it with the recor which was contradictory and repugnant to the allegation, - - 2

VENUE.

1. A change of venue cannot be granted on the application of the *owner* of a slave dicted for murder. The slave should petition in person for such change of venue.— *Fanny v. The State*. - - - - - - - - - 1
2. See Practice, 13 & 14.
3. After the parties had announced to the court that they were ready for trial, a the jury were being called into court, the plaintiffs presented their petition for change of venue. Held, that the court properly refused, under such circumstance to award a change of venue. There might be cases, in which the party mig show good reasons for not applying sooner, and excuse himself for the delay; b none such appeared in this case.—*Fugate & Young v. Carter*, - 2

VERDICT.

1. See Pleading, 3,
2. " Practice, 6,
3. " " 18 & 21,
4. " New trial 4.

WARRANTY.

A purchaser at a sale with a knowledge of the defects of the thing purchased, is n entitled to redress unless there has been a warranty.—*Dooly & Kirkland v. Jinnings*

WILLS AND TESTAMENTS.

1. The 10th sect. of the act concerning wills and testaments, of February 19th, 18 [see R. C. 1825, p. 792,] giving to the circuit court jurisdiction of the probate of wi in certain cases, is not inconsistent with the 6th section of the act concerning cou of 7th January, 1825, (R. C. 1825, p. 270,) providing, that the several courts of p bate shall have exclusive original jurisdiction in all cases in relation to the prob of last wills and testaments, &c.," and the 4th sect. of the act of January 2 1827, by which the probate court was abolished, and all its jurisdiction transfer to the county court.—*Dickey et al v. Malechi*, - - - 1
2. The circuit court, in entertaining a petition to establish a will, which has b rejected by the county court, does not exercise any original jurisdiction. The leg

lature may provide other modes, besides the ordinary form of appeal, by which the controlling power of the circuit court may be exercised; and in the 10th sect. of the act concerning wills and testaments, [R. C. 1825, p. 792,] they have made such provision, - - - - - - - - *ib.*
3. Whether a will is destroyed before or after the death of the testator, if destroyed without his knowledge or consent, it does not cease to be his will, and its contents may be established by competent proof, - - - - *ib.*
4. One witness is sufficient to establish the contents of a lost will, - *ib.*
5. Probate may be granted of so much of a will as can be proved, - *ib.*
6. The 10th sect. of the act of 1825, concerning wills and testaments, providing that the verdict of the jury shall be final as to the facts, precludes the Supreme Court from enquiry into the sufficiency of the evidence to sustain the verdict of the jury, in proceedings under that section; but as in other cases, if the court permit illegal testimony to go to the jury, the Supreme Court has power to correct such error, *ib.*
7. A devisee, who is also heir at law, is a competent witness to establish the contents of a will lost or destroyed, when he has no interest in the event, or when the establishment of the will is againt the interest he would have as heir. - - *ib.*

WITNESSES.

1. See Wills & Testaments, 4 & 7.
2. " Practice, 16 & 31.
3. " Evidence, 3d sub-division.

WRITS.

1. The want of service of a writ is cured by appearance and defence.—*Griffin & Kinote v. Samuel*, - - - - - - 50
2. See Practice, 26.

WRIT OF ERROR.

1. A writ of error will not lie on the decision of the circuit court in overruling a motion to discharge a defendant from his recognizance, such not being a final decision in the cause.—*Laporte v. The State*, - - - - - 208

Gt. R.J.C.

ERRATA.

Page 2, line 32, after *she* insert *so.*
" 8, " 21, " 3 " 7.
" 14, " 3, for *petitition*, read *petition.*
" " " 17, for *a* read *the.*
" 18, " 18, omit *not.*
" 20, " 8, for *recover* read *reconvey.*
" " " 17, after *pay*, read *the*, and omit *the* after costs.
" 22, " 7, side note, for *acknoledgment*, read *acknowledgment.*
" 22, " 24 & 25 " " *In dept unconditioned*, read *defendant unconditionally.*
" " " 28 " omit *but.*
" 24, " 5 for *rational*, read *material.*
" 25, " 18, insert *a* after *upon.*
" " " 24, for *prescribed* read *described.*
" " " 29 " *record. Altogether*, read *record, although.*
" 26, " 4 " *indentical* read *identical.*
" " " 27 " *was* " *were.*
" " " 22 " *af* read *of.*
" 27, " 5, " *indentify* read *identify.*
" " " 31, before *Rex* insert *In.*
" " " 32 for *proposed* read *purported.*
" " " 37 " *prosecution, so* read *prosecution. So*
" 30, " 6 " *reviewed* " *viewed.*
" " " 23 after *is* insert *a.*
" 31, lines 9, 13 & 32, for *Sittler* read *Littler.*
" " line 36 for *some* read *one.*
" 32, " 14 " *Langworthe* read *Langworthy.*
" " " 29 " *Sittler* " *Littler.*
" 33, " 23 " *Little* " "
" 34, " 27 after *that* insert *no.*
" 37, " 4 for *authority*, read *authenticity.*
" 40, " 14 side note, for *authority* read *authenticity.*
" " " 3 after *go* insert *to.*
" " " 26 " *to* " *set.*
" 41, " 18 for *Mo.* read *Mod.*
" " " " " *Bayard and Peake* read *Bayard's Peake.*
" " " 30 " *admitted,*" *Bayard and Peake*, read *admitted.*" *Bayard's Peake.*
" " " 31 for *diction* read *dictum.*
" 45, " 5 " *bail* " *baillee.*
" " " 32 after *have* insert *been.*
" " " 36 " *that* " *that.*
" 49, " 10 for *exclusions* read *exclusion.*
" 50, " 3 " *bonds* " *bond.*
" " " 4 " *see* " *sue.*
" " " 7 " *setting* " *sitting.*
" 52, " 28 side note, for *setting* read *sitting.*
" " " 33 " " *reserved* " *reversed.*
" " " 31 for *setting* read *sitting.*
" 53, " 28 " *was* " *were.*
" " " 22 " *witness* " *witnesses.*
" 54, " 2 " *trial, excluding* read *trial. Excluding.*
" " " 3 " *testimony. There* read *testimony, there.*
" 57, " 27 " *judgment*, read *suit.*
" " " 37 " *none*, read *more.*
" 59, " 1 head note, after *as* insert *well as.*
" 106, " 8 head note; for *for*, read *from.*
" 113, " 14 for *by* read *from.*
" 114, " 5 " *himself, such* read *himself. Such.*
" " " 18 after *that* insert *the.*
" 115, " 21 for *that* read *then.*
" " " 5 side note—for *for*, read *from.*
" " " 21 for *tha'* read *them.*

ERRATA.

Page 117, line 5, omit the first *to*.
" 119, " 15, " *only*.
" 120, " 34, for *and* read *are*.
" 121, " 5, " *hand* read *had*.
" " " 6, after *less* insert *to*.
" 145, " 2, head note; for *deceased* read *decedent's*.
" 146, " 12, side note; for *deceased*, " *decedents*.
" 159, " 10, head note, for *covenantee*, read *covenantor*.
" 159, " 16, " for *obligee* read *obligor*.
" 161, " 14, for *labor, whilst* read *labor. Whilst*.
" " " " " *obligation* " *obligations*.
" " " 20, " *required. It* " *required, it*.
" " " 25, " *person on* " *person. On*.
" " " 30, " *test, was* " *test? Was*.
" 162 " 11, " *the* " *a*.
" " " 23, " *principle* " *principles*.
" 163 " 1, " *an* " *and*.
" " " 6, " *became necessary* read *becomes unnecessary*.
" " " 8, " *verdict, the* read *verdict. This*.
" 166, " 9, " *and* read *are*.
" 175, " 36, " *curt* " *court*.
" 177, " 2, head note, for 1835, read 1825.
" 178, " 37, for *provision* read *provisions*.
" " " 38, " *was*, " *were*.
" 185, " 30, " *state of facts* read *states of fact*.
" 187, " 36, " *there* " *therefore*.
" 192 " 33, after *are* insert 1*st*.
" 195 " 2, head note, for *and* read *at*.
" 196 " 19, for *grocer* read *grocery*.
" 197, The last paragraph of this opinion is incorrect, what was said was, in substance, that "no proof of a license was necessary, it being a proper matter of defence, &c."
" 205 " 28 for *question* read *questions*.
" " " " " *count* " *court*.
" " " 37 " *province* " *purview*.
" 206 " 20 " *fairly* " *fatally*.
" " " 38 " *here* " *true*.
" 218 " 21 " *influence* " *inference*.
" 219 " 1 " *boundries* " *boundaries*.
" 240 " 35 " *improbability* read *impossibility*.
" 241 " 13 " *punishments, that* read *punishments. That*.
" 243 " 36 " *conditional* read *unconditional*.
" 244 " 9 " *even chivalrous* read *unchivalrous*.
" 271 " 14 " *duty* read *delay*.
" 272 " 6 " *bar* " *law*.
" 279 " 10 [head note] omit *or latent*.
" " " 13 [" "] " "
" 308 " 9 for *conclusions, after* read *conclusions. After*.
" 309 " 29 after *construction* insert *in Pennsylvania*.
" 316 " 15 for *principle* read *principal*.
" 344 " 31 after *not* insert *both*.
" 345 " 10 for *and* read *in*.
" " " 14 " *understood* read *understand*.
" 351 " 10 " *on* read *in*.
" 392 " 10 [head note] for *commenced* read *convenient*.
" 358 " 4 [head note] before *indebtedness* insert *known*.
" 435 " 12 [head note] for *loose* read *lose*.
" 441 " 39 [side note] " " " "
" 526 " 13 [head note] " *equivalent* read *equivocal*.